facie case absent evidence that age played a role in 3M's decision.

At the appellate stage of this litigation, the Eighth Circuit also analyzed Stidham's claims under the *McDonnell Douglas* framework. After first noting that "summary judgment should seldom be utilized in employment cases," the court engaged in *de novo* review of all the evidence submitted to the District Court. *Stidham v. Minnesota Mining and Manufacturing, Inc., d/b/a 3M Company*, 399 F.3d 935, 937-38 (8th Cir. 2005). Applying Eighth Circuit precedent, the court focused on whether Stidham had produced any evidence -- direct, statistical or circumstantial -- to raise an inference of discrimination. *Id.* at 938. After carefully examining all of the proffered evidence, the court agreed Stidham had not established her *prima facie* case.

REASONS FOR DENYING PETITION

I. Petitioner Relies On Incomplete Analysis and Undue Emphasis on Terminology over Substance to Allege a Circuit Split Where One Does Not Exist.

The Eighth Circuit's decision does not conflict with decisions of other circuit courts that have considered the elements of a plaintiff's *prima facie* case in a reduction-in-force age discrimination case. Stidham's contrived argument to the contrary fails upon even a cursory analysis of the cases Stidham cites. While Stidham may be dissatisfied with the outcome of this case and her appeal, and while she may disagree with the Eighth Circuit's reasoning and decision, the appellate court's analysis is sound and consistent with established precedent from this Court and other circuit courts. This Court has no compelling reason to grant certiorari.

A. The circuit courts use varying terminology but consistent analysis with regard to the fourth prong of the *prima facie* case.

Stidham does not dispute the fact that the circuits uniformly apply the framework established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to reduction-in-force age discrimination claims. In traditional, non-reduction-in-force cases *McDonnell Douglas* requires a plaintiff to make a *prima facie* showing that:

1. she was a member of a protected class;
2. she applied and was qualified for an open employment position;
3. she did not obtain the job; and
4. the job remained open and the employer continued to seek applications from persons with the plaintiff's qualifications.

McDonnell Douglas, 411 U.S. at 802. This framework is slightly modified in reduction-in-force cases to reflect the fact the employer did not retain the plaintiff as opposed to refusing to hire her. In such cases, the fourth element is "relaxed" in the sense that courts look at the circumstances under which the plaintiff was discharged and other employees were retained rather than whether the employer hired someone else with the plaintiff's qualifications to fill the position. *See LeBlanc v. Great Am. Ins. Co.*, 6 F.3d 836, 842 (1st Cir. 1993); *In re Carnegie Center Associates*, 129 F.3d 290, 295 (3d Cir. 1997).

While the circuit courts may articulate the fourth element of the *prima facie* case in slightly different ways, the analysis they use is the same. To establish a *prima facie* case, a plaintiff must show a similarly-situated younger employee was retained or some other kind of evidence that age was a factor in the employer's action. In short, the circuit courts consistently require a plaintiff to present facts that create an inference that the employer's actions were motivated by age.

The Third, Fourth and Seventh Circuits look at whether similarly situated employees who are substantially younger than the plaintiff are retained or otherwise treated more favorably than the plaintiff. *See Monaco v. American General Assurance Co.*, 359 F. 3d 296 (3d Cir. 2004); *EEOC v. Clay Printing Co.*, 955 F.2d 936 (4th Cir. 1992); and *Balderston v. Fairbanks Morse Engine Div. of Coltec Ind.*, 328 F.3d 309 (7th Cir. 2003). In making this determination, these circuits consider any evidence that creates an inference that age was a factor in the employer's action.

In *Monaco*, 359 F.3d at 305, the Third Circuit held that analysis of the fourth element requires a "fact-intensive inquiry on a case-by-case basis" including such things as job function, salary and level of supervisory responsibility. The

Fourth Circuit similarly undertakes a broad analysis of the underlying circumstances, looking at both retention of similarly situated younger employees and "some other evidence indicating that the employer did not treat age neutrally." *EEOC v. Clay Printing Co.*, 955 F.2d at 941. The Seventh Circuit specifically directs the lower courts to consider all kinds of evidence, including education, experience, performance and qualifications, in determining whether an employer treated a similarly situated person outside of the protected class more favorably that the plaintiff. *Zaccagnini v. Chas. Levy Circulating Co.*, 338 F.3d 672 (7th Cir. 2003).

The Sixth, Eighth and Tenth Circuits engage in this same broad analysis of the fourth *prima facie* element, permitting a plaintiff to present direct, circumstantial, statistical or other evidence to support an inference that age was a factor in the employment action. *See Barnes v. GenCorp, Inc.*, 896 F.2d 1457, 1465 (6th Cir. 1990) (stating a plaintiff needs to present "additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons."); *Bashara v. Black Hills Corp.*, 26 F.3d 820, 823-25 (8th Cir. 1994) (stating that fourth element requires plaintiff to "come forward with additional ... evidence that age was a factor in his termination;" this evidence "may take many forms") (citations omitted); *Ingeles v. Thiokol Corp.*, 42 F.3d 616, 621 (10th Cir. 1994) (holding plaintiff required to show "evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue....This element may be established through circumstantial evidence that the plaintiff was treated less favorably than younger employees during the reduction-in-force").

3M recognizes that the circuit courts do not all use the same terminology to describe the type of evidence necessary to meet the fourth prong of the *McDonnell Douglas prima facie* case. Some courts require "other evidence" that age was not a neutral factor. Others require "sufficient evidence" to create an inference that age was a factor in the decision. Still others require "additional evidence" that the employee was singled out due to age. Stidham seizes upon these phrases in an attempt to assign to them different meanings that vary enough to create a supposed circuit split. In reality, these are distinctions without a difference.

When one looks beyond the particular language each circuit court uses to describe the elements of the plaintiff's *prima facie* reduction-in-force case, the courts' common criteria are clear. Every circuit court requires a plaintiff to submit some kind of evidence that creates, at the very least, an inference that the employer considered plaintiff's age in making the employment decision. This fully comports with this Court's requirement that a plaintiff proffer *prima facie* evidence sufficient to create an inference that the employer's action or decision was based on discrimination. *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. at 312. Indeed, if that were not the requirement, the burden-shifting *McDonnell Douglas* framework that underpins the *prima facie* case analysis would collapse because an employer would have nothing to rebut.

Here, the Eighth Circuit joined the other circuits in requiring that Stidham do more than simply allege that age had something to do with 3M's decision to eliminate her environmental administrator position as part of the reduction-in-force. After noting summary judgment "should seldom be utilized in employment cases" (Petitioner's Appendix at 5a) the Eighth Circuit carefully considered the full range of available evidence before concluding that Stidham failed to

make her *prima facie* case. Contrary to Stidham's assertion in her Petition, the Eighth Circuit did not require her to prove discriminatory intent at the *prima facie* stage of the case. (Petition at 22.) Rather, the Eighth Circuit required Stidham to produce evidence that created an *inference* of discrimination, which is precisely the standard this Court established and the other circuits have followed.

B. The Third Circuit's framework for analyzing the *prima facie* case is consistent with that of the other circuits.

Stidham relies primarily on a 1996 Third Circuit case, *Marzano v. Computer Science Corp.*, 91 F.3d 497 (3d Cir. 1996), in asserting the circuits are split on how to address the *prima facie* requirements of an age discrimination claim in the context of reductions-in-force. Stidham speculates the Third Circuit would have decided the present case differently. As noted above, Stidham is wrong. The circuits are not split on the requirement that a plaintiff produce some evidence from which discrimination may be inferred as part of her *prima face* case. Moreover, Stidham ignores the development of the law since *Marzano*.

Marzano involved a pregnancy discrimination claim related to a reduction-in-force. The Third Circuit rejected the district court's requirement that *Marzano* produce some evidence other than the fact that employees who were not members of a protected class were retained. *Marzano*, 91 F.3d at 507-08. The *Marzano* court determined the fourth *prima facie* element is met by a simple showing that an unprotected worker was retained and plaintiff was not.

Since *Marzano*, this Court has rejected the Third Circuit's test. *See O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996). Moreover, the Third Circuit has refined its test to conform to this Court's and the other

circuits' requirement that a plaintiff show something more. In *Anderson v. Consolidated Rail Co.*, 297 F.3d 242, 250 (3d Cir. 2002), an age discrimination case involving a reduction-in-force, the Third Circuit followed this Court's holding in *O'Connor* that the fourth element of the *prima facie* case requires a plaintiff to show "the employer retained someone similarly situated to him who was sufficiently younger." Two years later, the Third Circuit explained that this determination involves a "fact-intensive inquiry on a case-by-case basis" including such things as salary, job function, level of supervisory responsibility and "other factors relevant to the particular workplace." *Monaco v. American General Assurance Co.*, 359 F.3d 296, 305 (3d Cir. 2004).

The Eighth Circuit's analysis and decision here involved a similarly broad, fact-intensive inquiry. To suggest otherwise or assert that the Eighth Circuit made it more difficult for Stidham to establish her *prima facie* case than the Third (or any other) Circuit defies logic. By considering all kinds of evidence -- direct, circumstantial, statistical -- the Eighth Circuit gave Stidham the opportunity to present any kind of evidence that would create a bare inference that her age was a factor in 3M's decision. If anything, the Eighth Circuit's expansive application of the test made it *easier* for Stidham to establish the fourth element of her *prima facie* case. She ultimately failed to do so, which reflects the fact that there is simply no evidence from which discrimination may be inferred.

II. The Eighth Circuit's Decision Implements This Court's Requirement That There be a "Logical Connection" Between the *Prima Facie* Case and the Alleged Discrimination.

This Court made it clear in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), that every element of the *prima facie* case must be connected to the claimed

illegal discrimination. *O'Connor* involved a discharged 56-year-old plaintiff who was replaced by a 40-year-old employee. Both the district court and the Fourth Circuit held that O'Connor had not established his *prima facie* case because he was replaced by another member of the ADEA's protected age group. They interpreted the fourth element to require a plaintiff to be replaced by a worker who was under forty.

In reversing the lower courts, this Court stated "there must be at least a logical connection between each element of the *prima facie* case and the illegal discrimination for which it establishes a 'legally mandatory, rebuttable presumption.'" *Id.* at 311-12 (quoting *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 254 (1981)). The Court observed that while the ADEA limits the protected class to persons who are forty or older, the ADEA bans *all* discrimination based on age. The element of replacement by a person who is under forty failed the logical connection test because it too narrowly defined the ADEA's scope.

O'Connor's significance goes well beyond its holding that the ADEA prohibits discrimination based on age rather than class membership. This Court also directed the Fourth Circuit and other courts to look more closely at the evidence presented in connection with the *prima facie* case. Specifically, the Court held the *prima facie* case requires "'evidence adequate to create an inference that the employment decision was based on a[n] [illegal] discriminatory criterion....'" *O'Connor,* 517 U.S. at 312 (quoting *Teamsters v. United States,* 431 U.S. 324, 358 (1977)) (emphasis omitted). If Mr. O'Connor could show he was replaced by a "substantially younger" person, that would constitute sufficient evidence to "create an inference" of discrimination. Implicit in the Court's decision is the

recognition that a person must present some kind of evidence from which an inference of discrimination may be drawn.

Here, the Eighth Circuit followed this Court's precedent by requiring Stidham to produce evidence establishing a logical connection between the fourth element of her *prima facie* case and claimed discrimination by 3M. Because she was unable to do so the *McDonnell Douglas* inquiry could not and did not proceed. There is no implication or evidence of discrimination for 3M to rebut. The Eighth Circuit's determination that Stidham's claims must be dismissed fully comports with *O'Connor*.

CONCLUSION

This case involves the application of established precedent to a unique set of facts. The United States Supreme Court should not expend its resources on a case that does not involve a circuit split or important, unresolved questions of law. Stidham is challenging a circuit court decision that is faithful to this Court's applicable precedent. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Respondent's Appendix A:
Excerpts from Deposition of Deborah Stidham
(taken April 29, 2003)

Pages 31-32:

Q. At the time that you worked at the Columbia plant -- right before you were advised that your position was being eliminated -- what was Rebecca Hyde's position at that time?

A. I can't say. I don't know. I know she's a young engineer. That's all I know.

Q. All right. Are you an engineer?

A. No, I am not an engineer.

Q. Do you know what job duties she held at the time that you were advised that your position was being eliminated, regardless of what her position was called?

A. No, I don't. There are many young --

MR. SCHAPPE: You have answered her question.

THE WITNESS: Okay.

Q. (By Ms. Mahoney) Do you know whether or not you were capable of doing all of the functions of Rebecca Hyde's position at the time that you were advised that your position was being eliminated?

A. Since I don't know what job she was doing, I guess I couldn't answer that, could I?

Q. Is it your contention that Rebecca Hyde's position should have been eliminated instead of yours?

A. I can't really answer that since I don't know what she was doing at that time.

Q. At the time that you were advised that your position was being eliminated, you were given the option of remaining employed at 3-M, isn't that right?

A. Yes. I could be demoted and go to a production job on a second or a third shift.

Q. Who told you that you would have to go to a job on second or third shift?

A. Mike Potter.

Q. And what exactly did Mike Potter say to you?

A. He said you would have to go to a job that we have a need for. And it would be on the second or third shift in production.

Q. You chose not to take that option, is that right?

A. That's true.

Page 61:

Q. You agree that there was a reduction in force at 3-M in April of 2001 that resulted in the elimination of 16 salaried positions, right?

A. I do agree to that. That there was an economic downturn during that period of time.

Respondent's Appendix B:
Excerpts from Deposition of Larry L. Wall
(taken May 13, 2003)

Pages 15-16:

Q. Okay. As part of the -- well, strike that. As the environmental administrator what exactly was Mrs. Stidham's role in the 3-M Columbia plant? What did she do?

A. Probably the main or the biggest part of what she did working with Bill was -- you know, they developed a plan and executed a plan, really, for some of these waste streams that might be recycled.

Q. Okay.

A. And probably the greatest success would be the polyester.

Q. Okay.

A. Where we put -- in our process we purchase and use a lot of polyester as an interleaf -- a tremendous amount -- which was just going to the landfill.

Q. Okay.

A. And so a big part of her work was -- well, several pieces of that -- you know, you identify a recycler that would take that and develop the systems within the plant for how we capture, collect, label, accumulate and manipulate so we could make it flow into that stream.

Q. Okay.

A. And the result being we stopped dumping a lot of polyester into the landfill.

Respondent's Appendix C:
Excerpts from Deposition of Bill D. Moore
(taken May 14, 2003)

Pages 17-18:

Q. What kinds of things -- well, what kinds of things was Mrs. Stidham asked to help recycle as part of her environmental administrative position?

A. The primary thing that I recall was polyester.

Q. Okay. What brought about the need to have a -- was this a new program to recycle polyester?

A. No.

Q. It had been ongoing already?

A. It had been initiated sometime before. And basically we needed a new emphasis on it, because we hadn't formalized it. And it was not active. So, we needed to reactivate it. We needed to formalize it in order to be a very successful program.

Q. How long prior to when she -- that this announcement in Exhibit 19 which is dated September 1, 2000 -- how long prior to that had the polyester recycling program been initiated?

A. You know, I'm going to have trouble answering that for sure. Because we had -- at some date prior to that we had been recycling polyester. And then we stopped doing it. Okay? And then after this announcement we started it up again. So, the exact time frames there -- I can tell you that's a sequence.

But I can't put the dates exactly in place.

Pages 34-35:

Q. The first bullet says that she would initiate meetings with warehouse champions to discuss the PET recycling process. And my understanding is that PET was the polyester recycling process. Work through several warehousing issues between -- is that the microflex warehouse and main warehouse?

A. I'm going to guess that that's what she means.

Q. To keep open communications and will continue to meet as needed. Now, who meets -- who conducts these meetings now?

A. It's not needed anymore.

Q. Okay. Why not?

A. Debbie finished the project.

Q. Well, polyester is still being recycled, is that correct?

A. Right. But it's been established. And what we asked Debbie to help us with was complete it. And so, you know, it doesn't need what she was doing here.

Q. Okay.

A. It says here to begin PET recycling process. Done.

Page 49:

Q. Okay. In your opinion does the environmental team miss Deb Stidham? And I'm going to clarify that for you. I don't mean from an emotional standpoint. From a getting the job done standpoint does the environmental team miss Deb Stidham?

A. No.

Q. Who is doing the things now that she did?

A. For the most part what Debbie really contributed and did was actually get our polyester program situated and in place. Okay? So, the transition for us was pretty easy because she really was bringing that to completion when she -- you know, when she actually left. So, it wasn't like we had to -- like I had to start doing a lot of stuff, or Margaret or any of the other people in our group. Okay? So, from that point of view there wasn't really a lot of distribution of load or work. So --

Respondent's Appendix D:
Excerpts from Defendant 3M's Answers to Interrogatories
(served March 6, 2003)

Answers to Interrogatory Nos. 1, 4 and 6:

INTERROGATORY NO. 1: State Plaintiff's title and duties immediately prior to her separation from employment from 3M.

ANSWER: Defendant 3M objects to this Interrogatory on the grounds that plaintiff already possesses the information sought by this Interrogatory. Subject to and without waiving any objections, defendant 3M states that immediately prior to her separation from 3M, plaintiff held the position of environmental administrator at 3M's Columbia facility. In this position, plaintiff's principal duty was to make the necessary arrangements incident to 3M's implementation of a polyester recycling program. Components of this position included planning waste minimization, attending weekly meetings of the environmental team, providing input for HAZCOM training and refrigerant coordinator duties.

INTERROGATORY NO. 4: For each and every duty listed in response to interrogatory 1, state the following:

(a) whether that duty is still performed;

(b) if yes to (a), the name of each employee who has performed that duty since Plaintiffs separation from employment and the dates on which that person had held the responsibility of performing those duties.

ANSWER: Subject to and without waiving any objections, defendant 3M states that with regard to the duties

listed in Interrogatory No. 1, the implementation of 3M's polyester recycling program has been completed. The responsibility for sustaining the polyester recycle program has been integrated into 3M's overall manufacturing operations. Area supervisors and operation team members have responsibility for insuring the polyester is properly collected. Warehouse staff are responsible for shipment to the vendor, an administrative assistant is responsible for record keeping and a compliance specialist is responsible for tracking performance.

Although plaintiff held refrigerant coordinator duties, she did not fully engage in those activities. These responsibilities require a small percentage of time to be performed, and Terri Smith currently performs these duties.

INTERROGATORY NO. 6: State the names of all people who have held the position of environmental administrator since January 1, 1998.

ANSWER: Defendant 3M objects to this Interrogatory on the grounds that it is not properly limited in geographical location and seeks information relating to any 3M facility world-wide, and as a result, is not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving any objections, defendant 3M states that at 3M's Columbia facility, plaintiff is the only person who held the position of environmental administrator from January 1, 1998 to the present.